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No. 82-15

In the Supreme Court of the United States

OCTOBER TERM, 1982

RAY E. OLIVER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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Petitioner contends that the court of appeals erred in holding that the warrantless search of his fenced and posted field was permissible under the "open fields" doctrine.

Petitioner was indicted in the United States District Court for the Western District of Kentucky and charged with manufacturing marijuana, in violation of 21 U.S.C. 841(a). Prior to trial, he moved to suppress evidence obtained from a warrantless search of his property, and the district court granted the motion (Pet. App. 21-24). A panel of the court of appeals affirmed (*id.* at 25-30). The court granted the government's petition for rehearing en banc, and, by a 5-4 vote, reversed the grant of the suppression motion (*id.* at 31-66).

1. The evidence adduced at a suppression hearing established that on July 18, 1980, an anonymous informant advised a Kentucky state police officer that petitioner was growing marijuana on his farm. The officer had heard other reports in the community to the effect that petitioner was engaged in some kind of questionable activity on his farm, so the officer, joined by a second detective, drove to petitioner's farm to investigate (A. 13-14).[1]

When the officers arrived at the farm, they drove down a road past petitioner's house to a point at which they encountered a locked gate across the road. There was no fence at one end of the gate, and there was a path around the gate at that point, which the officers followed (A. 14, 31, 39). They had walked several hundred yards along the road on the other side of the gate when they heard someone yelling at them from a distance that there was no hunting allowed. They announced that they were police officers and walked towards the place where they had heard the person shouting at them. When they arrived there, however, they did not find anyone (A. 14). The officers then returned to the road, walked some distance farther down the road, and discovered a large field full of marijuana (A. 15). The officers subsequently arrested petitioner for manufacturing a controlled substance.

Following a hearing, the district court suppressed the evidence of the discovery of the marijuana (Pet. App. 21-24). The court noted that the gate across the road was locked, that the property was posted with "No Trespassing" signs, and that the fields where the marijuana was located were in a secluded part of the farm (*id.* at 22). On the basis of these factors, the district court concluded that petitioner had a reasonable expectation of privacy in the area where

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[1] "A." refers to the appendix in the court of appeals.

the marijuana was discovered and that, because the officers had entered that area without a warrant, the discovery of the marijuana would not be admissible at trial.

2. A panel of the court of appeals affirmed the suppression order. The panel noted that under the "open fields" doctrine of *Hester* v. *United States*, 265 U.S. 57 (1924), warrantless searches are permitted of any area outside private residences and the "curtilage" around those residences (Pet. App. 27). However, the panel concluded that the *Hester* decision had been undercut by the Supreme Court's subsequent decision in *Katz* v. *United States*, 389 U.S. 347 (1967), which held that Fourth Amendment rights generally turn on the presence of a legitimate expectation of privacy, not on distinctions in property concepts (Pet. App. 28). On the facts of this case, the panel held, petitioner had a reasonable expectation of privacy in the field where the marijuana was growing, since the field was located on the other side of a locked gate marked with "No Trespassing" signs (*id.* at 28-29). Because the Sixth Circuit's prior decision in *United States* v. *Hassell*, 336 F. 2d 684 (1964), cert. denied, 380 U.S. 965 (1965), relied on the *Hester* "open fields" doctrine, the panel declared that *Hassell* is "no longer the law of this circuit" (Pet. App. 30).

3. On rehearing en banc, a majority of the full court disagreed with the panel's conclusion that *Hester* had been undercut by *Katz*. The court noted that while the Supreme Court had been called upon in *Katz* to apply the Fourth Amendment to circumstances—the monitoring of a telephone conversation—"that could not have been contemplated at the time the Amendment was formulated and adopted," the open fields doctrine of *Hester* simply made a distinction that was " 'as old as the common law' " (Pet. App. 34-35). The court also observed that there were indications in the *Katz* opinion itself that the *Hester* doctrine was still considered valid (*id.* at 35-36), and that this Court had

on several occasions since *Katz* referred to *Hester* without ever suggesting that its principle had been diluted (*id.* at 37). The court concluded that any expectation of privacy that a property owner might have in his open field was as a matter of law unreasonable (*id.* at 36).

Chief Judge Edwards and Judges Keith, Lively, and Jones dissented, contending that the open fields doctrine of *Hester* applies only to areas from which the public is not excluded or to an object or activity that is exposed to public view. Because they concluded that petitioner had taken measures to exclude the public from his property that gave rise to a reasonable expectation of privacy, the dissenters expressed the view that the open fields doctrine did not apply here (Pet. App. 38-65). Judge Lively wrote separately to express his view that this case did not involve an "open field" at all within the meaning of *Hester* (*id.* at 66).

4. Petitioner contends (Pet. 6-16) that the court of appeals erred in applying the open fields doctrine here. Whatever the merits of petitioner's contention, it is presently not ripe for review by this Court. The court of appeals' decision places petitioner in precisely the same position he would have occupied if the district court had denied his motion to suppress. If petitioner is acquitted following a trial on the merits, his contentions will be moot. If, on the other hand, petitioner is convicted and his conviction is affirmed, he will then be able to present his contentions to this Court, together with any other claims he may have, in a petition for a writ of certiorari seeking review of a final judgment against him. Accordingly, review by this Court of the court of appeals' decision would be premature at this time.[2]

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[2]Because this case is interlocutory, we are not responding on the merits to the question presented by the petition. We will file a response on the merits if the Court requests.

Petitioner correctly notes (Pet. 16) that the question of the scope of the "open fields" doctrine is currently before this Court in another case involving somewhat different facts, *Florida* v. *Brady*, cert. granted, No. 81-1636 (May 24, 1982). While the Court's decision in *Florida* v. *Brady* may have some bearing on this case, there is no need to hold this petition pending the Court's consideration of *Brady*. If the decision in *Brady* casts any doubt on the correctness of the decision below, petitioner can reap the benefit of that decision on his post-trial appeal, if he is convicted. There is no reason to hold this petition and further delay the trial in this case in which the indictment was returned in September 1980.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
Solicitor General

AUGUST 1982

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